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No._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT
Petitioner

v.

RICHARD OSTROSKI
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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QUESTIONS PRESENTED

1. Whether the respondent was seized in violation of the Fourth Amendment at the time he was escorted to the state police barracks on April 16, 1977.

2. If the respondent was seized prior to his formal arrest on April 16, 1977, did that seizure occur at a point in time at which the police had probable cause to believe he had committed murder.

3. Assuming that the respondent was seized in violation of the Fourth Amendment and that that seizure tainted his confession and certain physical evidence, whether their admission at trial was harmless beyond a reasonable doubt in view of the defendant's ratification of his confession at trial and his defense of absence of mental capacity.

4. If the respondent's Fourth Amendment rights were violated, whether a good-faith exception to the exclusionary rule should be adopted and applied in this case.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION:

1. The Connecticut Supreme Court's conclusion that the respondent was seized at the time he was taken to the Litchfield barracks is clearly at variance with the decisions of this Court 14

2. If the trial court erred in admitting the respondent's confession and certain physical evidence, then that error was clearly harmless beyond a reasonable doubt and the Connecticut Supreme Court's failure to so conclude effectively expanded the requirements of the federal constitution contrary to the decisions of this Court 20

3. If the respondent's Fourth Amendment rights were violated, then this Court should adopt a good-faith exception to the exclusionary rule and apply it to this case 23

CONCLUSION 28

APPENDIX A 1A

APPENDIX B 2A

Page

APPENDIX C.....4A

APPENDIX D 10A

APPENDIX E 15A

APPENDIX F 24A

TABLE OF AUTHORITIES

Page

Cases:

Bivens v. Six Unknown Named Agents of Fed. Bur. of Nar., 403 U.S. 388 (1971) 24

Brown v. Illinois, 422 U.S. 590 (1975) 23, 24, 26

Brown v. United States, 411 U.S. 223 (1973) 22

Chapman v. California, 386 U.S. 18 (1967) 21

Commonwealth v. Bradshaw, ___ Pa. Super Ct. ___, 434 A.2d 181 (1981) 25

Cupp v. Murphy, 412 U.S. 291 (1973) 14

Dunaway v. New York, 442 U.S. 200 (1978) 14, 15, 16, 20, 26, 27

Fontaine v. California, 390 U.S. 593 (1968) 21

Harrington v. California, 395 U.S. 250 (1969) 22

Michigan v. DeFillippo, 413 U.S. 31 (1979) 19

Michigan v. Tucker, 417 U.S. 433 (1974) 24

Nix v. State, 621 P.2d 1347 (Alas. 1981) 25

North Carolina v. Butler, 441 U.S. 369 (1979) 21

Oregon v. Mathiason, 429 U.S. 492 (1977) 15, 16

Payton v. New York, 445 U.S. 573 (1980) 14

Page

Cases - Continued:

People v. Adams, 53 N.Y.2d 1, 422 N.E.2d 537 (1981) 25

Richmond v. Commonwealth, 29 Cr. L. Rptr. 2529 (Ky. Sept. 23, 1981) 25

Robberson Steel Co. v. Occupational Safety & Health Review Commission, 645 F.2d 22 (10th Cir. 1980) 25

Schneble v. Florida, 405 U.S. 427 (1972) 22

Sibron v. New York, 392 U.S. 40 (1968) 15, 17

State v. Derrico, 181 Conn. 151, 434 A.2d 356 (1980) .. 17

Stone v. Powell, 428 U.S. 465 (1976) 23, 26

Terry v. Ohio, 392 U.S. 1 (1968) 14, 15

United States v. Ajlouny, 629 F.2d 830 (2d Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981) 25

United States v. Anderson, 663 F.2d 934 (9th Cir. 1981) 19

United States v. Calandra, 414 U.S. 338 (1974) 23

United States v. Ceccolini, 414 U.S. 268 (1978) 23

United States v. Havens, 446 U.S. 620 (1980) 23

United States v. Huberts, 637 F.2d 630 (9th Cir. 1980) 17

Page

Cases - Continued:

United States v. Janis, 428 U.S. 433 (1976) 23

United States v. Lara, 638 F.2d 892 (5th Cir. 1981) ... 17

United States v. Mendenhall, 446 U.S. 544 (1980) 14, 15, 17

United States v. Paynor, 447 U.S. 727 (1980) 23

United States v. Peltier, 442 U.S. 531 (1975) 23, 24

United States v. Preston, 608 F.2d 626 (5th Cir. 1979) 15

United States v. Richards, 500 F.2d 1025 (9th Cir. 1974) 19

United States v. Robinson, 625 F.2d 1211 (5th 1980) .. 17

United States v. Tara, 638 F.2d 892 (5th Cir. 1981) ... 15

United States v. Troutman, 590 F.2d 604 (5th Cir. 1979) 17

United States v. Viegas, 639 F.2d 42 (1st Cir. 1981) 15

United States v. Williams, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981) 25

Wong Sun v. United States, 371 U.S. 471 (1963) 23

Page

Constitution and Statutes:

United States Constitution:

Fourth Amendment 14, 15, 20, 22

Statutes:

28 U.S.C. §1257(3) 1

Conn. Gen. Stat. §53a-54a(c) 2

Conn. Gen. Stat. §53a-35(b), (c) 2

Conn. Gen. Stat. §53a-7 12

Conn. Gen. Stat. §53a-54a 12

Rules:

Sup. Ct. R. 17.1(c)(1980) 20

Conn. Prac. Bk. §2170 (now §759) 12

Miscellaneous:

3 W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment (1978) 15

Attorney General's Task Force on Violent Crime, 29 Cr. L. Rptr. 3131 (1981) 25

OPINIONS BELOW

The opinion of the Supreme Court of the State of Connecticut (App. C, *infra*, 4A-9A) in which it remanded the case to the trial court for further articulation of the factual basis of the trial court's decision on the defendant's motion to suppress is reported at 42 Conn. L.J., No. 51, p. 13) (1981). The opinion of the Supreme Court of the State of Connecticut to which this petition is addressed (App. E, *infra*, 15A-23A) is reported at 186 Conn. 287, 440 A.2d 984 (1982).

The original opinion of the trial court on the motion to suppress appears in a footnote of the first opinion of the Supreme Court of the State of Connecticut (App. C, *infra*, 6A). The opinion of the trial court after the remand for a further articulation of the factual basis of its decision on the motion to suppress is unreported and appears in the appendix (App. D, *infra*, 10A-14A).

JURISDICTION

The judgment of the Supreme Court of the State of Connecticut was rendered on February 23, 1982 (App. E, *infra*, 15A). On April 13, 1982, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including May 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated***."

STATEMENT

During the night of April 11-12, 1977, nineteen-year-old Kim Steacy was brutally stabbed to death in the small Connecticut town of Canton. Five days later, the respondent confessed to the killing at the State Police Barracks in Litchfield and was arrested. Following his indictment for murder and a trial before a three-judge panel of the Superior Court,[1] he was found guilty as charged and sentenced to a term of imprisonment of not less then twenty-five years nor more than life. See Conn. Gen. Stat. §§ 53a-54a(c), 53a-35(b), (c). The defendant appealed his conviction to the Connecticut Supreme Court claiming, among other things, that he was seized in violation of the Fourth Amendment when he was escorted to the state police barracks five days after the killing and that that illegal seizure tainted the confession he later gave as well as certain physical evidence of guilt. The state supreme court agreed, reversed the trial court's finding to the contrary, and ordered a new trial.[2]

In the early morning hours of April 12, 1977, Donald Miller returned to the apartment that he shared

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[1]The respondent waived his right to be tried by a jury of twelve and elected instead to be tried by a three-judge panel of the Superior Court. *See* Conn. Gen. Stat. § 54-82(b), (c).

[2]Although the respondent based his claim before the Connecticut Supreme Court on both article first, section seven of the state constitution and the Fourth Amendment of the United States Constitution, the court clearly indicated the predicate for its holding when it stated:

> We conclude that the defendant was seized at the time he was taken to the Litchfield barracks and that the trial court erred in admitting the confession and physical evidence obtained as a result of the interrogation at the Litchfield barracks on the night in question, which interrogation violated the defendant's fourth amendment protection against unreasonable seizures.

App. E, *infra*, 19A.

with Kim Steacy and found her lying dead on the floor in a pool of blood. Police and medical personnel were summoned to the scene. An autopsy of the body conducted later that day by the state's chief medical examiner led him to conclude that the cause of her death was blunt force injury to the head, incised wounds of the neck and larynx, multiple stab wounds of the chest, abdomen, left lung, stomach, and spleen, and external and internal hemorrhage.

The living room, where the body was found, was in total disarray and blood spots were found near the body and in various portions of the kitchen, including the utensil drawer. Among the items of physical evidence found at the scene were pieces of a ceramic vase covered with blood and hair and various knives and parts of knives with blood on them, which were found in various locations in the kitchen and living room. A palm print in blood appeared on a portion of the kitchen counter that was later removed and introduced into evidence.

Officers investigating the apparent homicide also noticed a trail of blood leading from the victim's apartment to the parking lot adjacent to the building. Analysis of the blood found in the parking lot and driveway disclosed that it was type AB blood, which is found in about four percent of a typical population group. The victim's blood type was O and is found in approximately forty-six percent of a typical population group.

An officer noticed a white opaque substance located on the pubic hairs of the victim, who was clad only with a bathrobe. This substance was removed and later determined to be seminal fluid and spermatozoa.

In the course of the investigation, a Connecticut trooper interviewed friends of the victim. He learned from a married couple who had been with the victim in her apartment on the Friday (Good Friday) prior to her death that during the evening a man had knocked at her door and invited her and the others present to join them at a party across the hall. They declined. On Friday, four days after the homicide, this couple identified the

respondent, Ostroski, as that person through the use of a photograph. The officers also were informed that two neighbors of the respondent had complained to town officials that the respondent's dog could be heard barking in the respondent's apartment the Tuesday and Wednesday after the killing.

Efforts by the police to locate the respondent initially had proved unsuccessful. On Saturday, five days after the killing, however, the respondent, who had evidently just returned from New York, called the State Police Barracks at Litchfield around 6:00 p.m., saying that he had heard that Captain McDonnell was looking for him and wanted to speak with him. The desk officer did have a message stating that, "If Mr. Ostroski had stopped in at the Troop . . . Captain McDonnell wanted to talk to him," and asked the respondent where he was so that a meeting could be arranged. When the respondent, who was with his wife and child, answered that he was in a phone booth in New Milford, the desk officer attempted to give the respondent directions to the barracks, which were long and involved. He soon discovered that the respondent was not familiar with the area and so told him that he would send an officer to New Milford to meet him and either bring him to the barracks or lead him there.

At some point during this conversation the respondent said, with regard to the time of the meeting with McDonnell, "Well, how about tomorrow?" The desk officer stated that he thought the respondent should come in that night, and explained his reasoning at the hearing on the motion to suppress by saying that when a captain asks to see somebody, he considers the matter important.

The respondent was more than willing to have another officer meet him to direct or take him to the barracks, however. The respondent described his location, and the desk officer arranged for the New Milford police to meet the respondent and have him follow their cruiser to the New Milford Police Department.

A state trooper from the Litchfield barracks, without having been asked to do so by a superior officer, went to meet the respondent at the New Milford Police Department. After agreeing that it would be mutually convenient for the respondent to travel in the cruiser to the Litchfield barracks, the respondent got in the front seat of the cruiser and his wife and child got in the back seat. See App. A, *infra*, 1A.

The trooper, who had no specific knowledge of the Kim Steacy homicide and apparently was not involved in the investigation, did not ask the respondent any questions concerning the case during the approximately forty-minute ride to the barracks. After some small talk between the Ostroskis and the trooper, the respondent stated that Captain McDonnell wanted to speak with him regarding a "homicide" or "killing" of a girl in Canton. The trooper responded that he did not know. The respondent then stated that he had been working up north as a carpenter and that that was the reason why he had cuts on his hands.[3] On the trip, the respondent appeared pleasant and talkative to the trooper, although the trooper did notice him become a little nervous. The respondent's conduct was normal in the trooper's opinion and he appeared to be lucid.

When the trooper and the Ostroskis arrived at the barracks, the respondent followed the trooper from the car to the building voluntarily. He was at no time placed in handcuffs or otherwise coerced to comply with the request that he speak with Captain McDonnell at the Litchfield barracks. App. D, *infra*, 10A.

Once the respondent arrived at the barracks he was met by Captain McDonnell, who had come to the barracks after having been informed that the respondent was coming in to see him. The two were introduced and proceeded to a room on the second floor of the building

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[3]The respondent objected to the elicitation of this testimony at the hearing on his motion to suppress claiming that at the time he made these statements in the cruiser he had not yet been given his *Miranda* warnings. The trial court found the respondent was not then in custody and that, therefore, no *Miranda* violation had occurred. *See* App. A, *infra*, 1A.

with another officer. The respondent's wife and daughter waited for him on the first floor of the building. The conversation and questioning that took place thereafter was tape recorded and a transcript of that recording, which was admitted into evidence, was presented to the state supreme court in the respondent's appendix to his brief.

The respondent was informed by McDonnell that he wanted to talk to him about the crime that took place in Canton on the previous Monday, and that they were talking to everybody that had been in and around the apartment. When asked if he had been involved with the police before, the respondent answered: "Many times." McDonnell told him that he would read his rights to him "just so there's no misunderstanding." He also stated for the record the time (a quarter after eight) and the fact that they were at the State Police barracks in Litchfield, and not at a "hotel or anything like that."

As McDonnell proceeded to read to the respondent his *Miranda* rights, the respondent interrupted by saying, "I thought these rights were for people under arrest," to which McDonnell responded, "No, it's for anybody that we talk to. . . . I'm just making sure here that you know what your [sic] . . . . [k]now what your [sic] doing. You are not under arrest. . . ." Later, McDonnell again assured him: "So any question in your mind while I'm reading these rights to you now, so okay, your not under arrest, okay?". The respondent answered: "All right."

McDonnell then read to the respondent his *Miranda* rights, including his right to stop answering questions at any time and his right to discontinue the interview at any time. The respondent then read aloud and signed a statement indicating that he was making a statement freely and voluntarily with full knowledge of his rights.

The interview began by McDonnell asking the respondent: "Okay, what can you tell us about that apartment Ricky, or those people that live around there, can you tell us anything that would help us out?" The

respondent began by telling McDonnell of his friend Stanley who had an apartment across the hall from the victim's. When asked when was the last time he was at Stanley's apartment, the respondent first answered by saying around two weeks ago and then corrected himself by saying that he thought he may have been there the day before or two days before Easter (Good Friday).[4]

The respondent went on to tell McDonnell about the time he went to the apartment across the hall from Stanley to ask the people there if they wanted to join Stanley and him for a few drinks. When asked by McDonnell when that happened, the respondent answered that he thought that that was one of the first few times he went up to Stanley's apartment and did not identify the incident as having occurred only eight days earlier.

The respondent then spoke of his trip "up north," to New York and Vermont and described it as an unsuccessful job-hunting trip. He went on to refer to "blisters all over my hands," and said that he was "always recking [his] fingers working with a carpenter," that he would "[c]ut [his] hands all to hell trying to cut" sheet rock or tar paper and that he had also cut his hands in the process of cutting shingles used for siding a home. He said that he had been working with these materials "about a week and a half, two weeks ago." When McDonnell asked to see his hand that was cut, McDonnell said that he saw only one cut. The respondent agreed that that one cut was the worst and that it had happened while he was cutting tar paper with a razor.

After some further questioning, McDonnell asked for, and was given, a sample of the respondent's hair. He also asked the respondent if he knew what his blood type was, and the respondent answered by saying that he thought it was AB negative. The respondent agreed

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[4]During the course of the questioning the respondent indicated that he had earlier attended college.

to sign a statement authorizing the police to get a record of his blood type from his doctor.

He was then asked about his recent travels, and said that he and his wife and daughter left on Tuesday morning (the morning after the homicide) at about 8 or 9 o'clock. They traveled to upstate New York, stayed overnight and then returned to Connecticut on Wednesday because they remembered that they had left the dog unattended. He stated that on Thursday afternoon after his wife picked up her unemployment check, they went to New York, to Vermont, back through New York and "were just travelling all over the place, going in circles." They returned to Connecticut on Saturday and, that same day, after the respondent called his mother and learned that McDonnell wanted to speak with him, called the Litchfield barracks.

The respondent was asked if he would mind letting the police search his car. After being assured that he could keep an eye on the troopers while they conducted the search and that he need not worry about the presence of any small quantity of drugs, he signed a consent form and said he had "no problem" about doing so.

The discussion turned to the respondent's travels during the week, the respondent's recollection of which was vague. The respondent told McDonnell that he had to buy new clothes, a new shirt and new pants, because "I forgot to bring clothes with us." He also said that when they left they had forgotten about the dog. In the course of the questioning, the respondent was asked if he minded taking off his shirt and pants; he stated that he did not and proceeded to let the officers examine his upper torso and legs. The respondent also permitted the officers to examine his shoes.

At one point, the respondent asked to talk to his wife. McDonnell, who had asked Sergeant Cudworth, the other officer present, to leave the room to get some search consent forms, agreed to the request but asked the respondent to wait until the other officer would return. When the respondent went on to tell McDonnell

that he wanted to speak with his wife so that she could provide McDonnell with some details about their trip up north, McDonnell, without denying the request, responded by saying that those details were not important.

After the respondent signed two consent forms, one permitting the police to ask his doctor regarding the respondent's blood type and the other permitting the police to search his car, he said, "I'd really like to get going as soon as possible, I'm beat. . . ."[5]

McDonnell then attempted to wrap up the interview and pointed to the rather suspicious fact that the respondent had left the state the morning after the night the victim was killed. The respondent acknowledged the cause for suspicion and continued to explain the motivation for his trip up north. When McDonnell asked the respondent about what he did on Monday (the day of the killing), he said that he got home at 8:00 or 9:00 p.m., ate a sandwich, watched a little television and went to bed before ten p.m. When he was asked what television programs he watched, he said he could not remember, and then said he was not sure he did watch television. When he was asked if, when he arrived home on Monday night, his wife had told him that his friend Stanley was looking for him, he first said he didn't remember, and later said that it was

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[5]The following exchange then took place:

SERGEANT CUDWORTH: Okay, doing a lot of driving heavy?

[RESPONDENT]: Oh yea, driving and. . . .

SERGEANT CUDWORTH: Did you do all the driving or did the wife do some?

[RESPONDENT]: Well she did some but I did most of it, I'm, I'm really beat, I'm so damn tired I, I could fall asleep on my feet, get to a motel and just go to sleep.

CAPTAIN McDONNELL: Why don't you go home, sleep in your own house.

[RESPONDENT]: I'm tired of driving.

possible. The respondent said that he had gone to Southington before going home and started drinking and that he was not sober when he came home that night. The respondent then said: "I'm pretty tired, you think I can go, I, I, I'm really, I'd like to terminate this thing cuz ahh any questions I answer, I prob . . . liable to start fuckin everything up and telling you I was doing one thing, when I was doing another cuz I'm tired and I don't feel good." No direct response to what the respondent said was given.

The conversation continued, and the respondent agreed to permit an officer to photograph his hand. When the respondent then asked if he could "at least get on the road pretty soon?" McDonnell responded by saying that he shouldn't worry about driving, because "[w]e'll drive you where-ever [sic] you end up wanting to go." The following exchange ensued:

> [RESPONDENT]: I want to go back to my car and then from there I'm gonna go, I'll go home, I'll go home, crimidy sakes, cuz I'm so tired. So, what do you think?
>
> CAPTAIN McDONNELL: I think you killed this girl Ricky.
>
> [RESPONDENT]: You think I killed her?
>
> CAPTAIN McDONNELL: Yeah, you asked me what I think, right, want me to be honest with you or you want me to lie to ya?
>
> [RESPONDENT]: I never killed nobody in my life, I couldn't.
>
> CAPTAIN McDONNELL: That's what I think.
>
> [RESPONDENT]: Jesus Christ.

They then talked about the possibility that the respondent committed the crime. McDonnell asked again about the respondent's cut on his hand, and asked the respondent if they would find blood in his car. The respondent said they wouldn't, and then posed this

question: "Do you actually think I honestly did this?" Captain McDonnell: "I think you probably did, probably did, you got a cut hand. . . ." Respondent: "Lord I hope not." After further questioning McDonnell reminded the respondent of the significance of the cut on his hand. He challenged the respondent's assertion that the cut had been there a couple of weeks and again asked the respondent what his blood type was. And when the respondent said "AB," McDonnell told him that AB blood was found at the scene, and that it is one of the rarest types of blood.

When the respondent asked for time to think, Sergeant Cudworth asked him if he wanted to talk with his wife. He said that he did, and McDonnell went downstairs to get her. After some exchange in which the respondent continued to question whether he could have killed the victim, his wife entered the room and they both talked privately.

Afterward, the respondent stated that he didn't remember anything, "I was tripping my fuckin brains out. . . ." After some questioning of the respondent's wife, McDonnell asked the respondent why he really went out of state on Tuesday. He answered by saying that he was scared, that he had blood on his hands. He said that there was too much blood, that he cleaned his clothes, that he threw his shirt in the Collinsville dump. McDonnell then asked how it happened and the respondent described in detail the killing and the events that followed.

The respondent was formally arrested for murder by Sergeant Cudworth, who then read his rights to him again, although the respondent said he would waive them. He was questioned further and then was asked if he wanted an attorney. When he said he didn't know one, Captain McDonnell offered to help him find one, but the respondent declined the offer. McDonnell then asked the respondent: "Got any complaints, or comments or anything Rick on the way that we, we've treated you or talked to you or anything, cuz if you do,

say so." He answered simply, "No." McDonnell again advised the respondent to get a lawyer.

A photograph was taken again of the respondent's hand and fingernail scrapings were taken. After some further questions, McDonnell encouraged the respondent to call his parents and an attorney. Finally, McDonnell convinced the respondent to get a lawyer and McDonnell went downstairs and to call a public defender. The respondent answered some additional questions and then asked that any further questioning be done the following day. When McDonnell asked if he could take a short written statement, the respondent said that he wanted to speak with a lawyer first and the questioning immediately ceased.

At the trial that followed his indictment for murder, the respondent moved to suppress the confession and the physical evidence seized as the result of the consents obtained from him during questioning at the barracks on the ground that his Fifth Amendment rights had been violated when he was questioned after he had asserted his right to remain silent. App. C, *infra*, 6A.

The trial court denied the motion, concluding that there was some question with respect to whether the respondent had unequivocally asked that the interrogation cease, that the rule of *Miranda* was not violated, and that the confession was "voluntarily, knowingly and intelligently made." *Id.*, 6A n.2. Although the respondent took exception to this ruling, he elected to take the stand at his trial and to ratify his confession and present to the court a defense of absence of mental capacity, which included the testimony of two psychiatrists.[6] That the respondent testified at trial voluntarily

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[6]Prior to trial the respondent filed with the court pursuant to Conn. Prac. Bk. § 2170 (now § 759), a notice indicating his intention to introduce at trial expert testimony bearing upon the issue of whether he had the mental state required for the offense charged. *See* Conn. Gen. Stat. §§ 53a-7, 53a-54a.

and knowingly is demonstrated by the preliminary inquiry on those issues conducted by both defense counsel and the court. *See* App. B, *infra*, 2A-3A.

On appeal, the Supreme Court concluded that, because the trial court had not clearly indicated whether the respondent was in custody at the time he was questioned, a remand of the case for further articulation of the trial court's decision was necessary. App. C, *infra*, 7A. In doing so, it indicated that for the first time on appeal the respondent had claimed that he was seized without probable cause at the time he was picked up at New Milford by a state trooper or, at least, when he entered the Litchfield barracks.[7] *Ibid.* The supreme court, noting that *Dunaway v. New York*, 442 U.S. 200 (1979) had been decided after the respondent's trial, directed the trial court to address this claim as well on the remand. *Ibid.*

On the remand, the trial court rendered a five page opinion in which it found that the respondent's freedom of action was not restricted in any significant way; he came voluntarily to the barracks; he was immediately and later informed that he was not under arrest; he was not subjected to threats or hints of threats; he was given, and repeated, his *Miranda* rights; he confessed in the presence of his wife; and that, while he may have been in a coercive environment, he had not been seized prior to his formal arrest and was not in custody for *Miranda* purposes until his formal arrest. App. D, *infra*, 10A-14A. In making this finding, the trial court stressed the significance that listening to the tape recording of the interview had on their decision. *Id.*, 13A.

The state supreme court, on final review, concluded that the respondent had been seized at the time he was

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[7]Actually, as the statement above discloses, *supra*, 5, the respondent did raise at trial the claim that he was in custody when he was picked up by a state trooper in New Milford. Yet the claim was then custody for *Miranda* purposes and not seizure for Fourth Amendment purposes.

"taken to the Litchfield barracks"; that the trial court's finding to the contrary was "clearly erroneous"; and that the respondent's confession and the physical evidence obtained as a result of the interrogation had been erroneously admitted at trial. App. E, *infra*, 19A. Although the state had urged in its brief that any error that may have occurred in the admission of this evidence was harmless beyond a reasonable doubt in light of the respondent's trial confession and defense (App. F, *infra*, 24A), the state supreme court failed to consider this claim and, instead, set aside the judgment, ordering a new trial. App. E, *infra*, 23A.

REASONS FOR GRANTING THE PETITION

1. The Connecticut Supreme Court's conclusion that the respondent was seized at the time he was taken to the Litchfield barracks is clearly at variance with the decisions of this Court.

This case presents important questions concerning the scope of the Fourth Amendment's proscription against unreasonable seizures and the applicability of the remedy devised for its violation. The Fourth Amendment's simple prohibition of unreasonable seizures encompasses seizures of the person. *Payton v. New York*, 445 U.S. 573, 585 (1980); *Cupp v. Murphy*, 412 U.S. 291, 294 (1973); *Terry v. Ohio*, 392 U.S. 1, 16 (1968). And it is now clear that a person may be seized in terms of the Fourth Amendment notwithstanding that no formal arrest or "booking" has occurred. *Dunaway v. New York*, 442 U.S. 200, 207, 216 (1979); *Terry v. Ohio*, *supra*, 16. The question for Fourth Amendment analysis is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J. joined by Rehnquist, J.). The test, which is an objective one, takes into consideration all of

those facts that, to an ordinary person, would convey the albeit unspoken message that his liberty of movement was being significantly restricted. *See United States v. Viegas*, 639 F.2d 42, 44 (1st Cir. 1981); 3 W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment, 52-54 (1978). Thus, a seizure may occur notwithstanding the absence of an attempt to leave or the execution of a formal arrest where the person is subjected to "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officers' request might be compelled." *Ibid.; see United States v. Tara*, 638 F.2d 892, 896 (5th Cir. 1981). Where, however, a citizen retains his freedom of choice and willingly cooperates with an officer's investigation, whether the investigative encounter takes place on the street or at the station house, no seizure has occurred. *United States v. Mendenhall, supra*, 554; *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (station house interrogation presenting issue of custody under *Miranda*); *Terry v. Ohio, supra*, 19 n.16; *Sibron v. New York*, 392 U.S. 40, 63 (1968). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio, supra*, 19 n.16, *see United States v. Mendenhall, supra*, 553.

Thus, in *Dunaway v. New York, supra*, 212, where the petitioner was "picked up," placed in a police cruiser and brought to a police station for questioning, was never told that he was not under arrest or that he was free to go, and, in fact, would have been restrained if he had attempted to leave, a seizure under the Fourth Amendment existed. *See United States v. Preston*, 608 F.2d 626, 631 (5th Cir. 1979). In *Oregon v. Mathiason, supra*, on the other hand, a suspect was found not to be in custody for *Miranda* purposes although he was interrogated in a police station about his involvement in

a crime. The suspect in *Mathiason* responded to a note left by an officer, in which he said that he wanted to discuss something with him by calling him the next day. *Id.*, 712. When the suspect expressed no preference as to a convenient place to meet, the officer asked if the suspect could meet him at the state patrol office, and the suspect agreed. *Ibid.* The suspect shook hands with the officer and was brought to an office, where he was told he was not under arrest. *Ibid.* He was questioned for a few minutes, was falsely told that the police had found his fingerprints at the scene, and shortly thereafter confessed to the crime. *Ibid.* The officer taped a confession and decided not to arrest the suspect at that time. *Ibid.* This Court concluded that, on the basis of those facts, the defendant was not in custody or deprived of his freedom of action in any significant way, even though the questioning may have taken place in a "coercive environment." *Id.*, 495.

The case before this Court is clearly distinguishable from *Dunaway* and more akin to *Mathiason*. Here, the respondent voluntarily initiated contact with the police by responding to a message left for him. There was no implication that he was being "picked up" against his will, inasmuch as the evidence indicated and the trial court found that a cruiser was sent for him only after it became apparent to him and the desk officer that he would have had difficulty following the rather complicated directions to the barracks. App. A, *infra*, 1A; App. D, *infra*, 10A. His riding together with the trooper rather than following in his own car was a matter only of mutual convenience and not the product of coercion. *Ibid.* The respondent's question about the possibility of meeting with Captain McDonnell the following day and the unfavorable answer given by an officer not involved in the investigation of the case surely did not convert the meeting that took place that night into an involuntary seizure of the respondent. No policeman threatened the respondent or used any show of force or coercive authority during the encounter, *see*

United States v. Robinson, 625 F.2d 1211, 1218 (5th Cir. 1980); no officer touched the respondent or his wife or child in any offensive or assertive manner. During the ride to the barracks, the respondent, who was accompanied by his wife and child, appeared to the trooper to be pleasant and talkative. *See Sibron v. New York*, *supra*, 63. No language of compulsion was used by the troopers. In fact, when at the barracks the respondent interrupted McDonnell as he attempted to read to him his *Miranda* rights by saying that he thought that *Miranda* rights were read only to people under arrest, he was assured that the reading was routine and that he was not under arrest. *See United States v. Lara*, 638 F.2d 892, 898 (5th Cir. 1981). He was later again expresaly informed that he was not under arrest. The respondent, who had been involved with the police by his own admission "many times," was cooperative, articulate, and had at least a partial college education.[8] *Cf. United States v. Mendenhall*, *supra*, 558.

Some of the factors considered by the state supreme court to have been dispositive of the issue were characterizations of selected facts at variance with the findings of the trial court, which heard witnesses and listened to the recording of the confession.[9] One was

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[8]Of course, when a trial court denies a motion to suppress, all of the evidence presented to it must be viewed in the light most favorable to the government. *See United States v. Huberts*, 637 F.2d 630, 635 (9th Cir. 1980); *United States v. Troutman*, 590 F.2d 604, 606 (5th Cir. 1979); *see also State v. Derrico*, 181 Conn. 151, 161, 434 A.2d 356 (1980).

[9]The statement that the respondent "was separated from [his] car and taken in a police car to the police barracks," (App. E, *infra*, 22A) obscures the real issue, and that is whether he accompanied the trooper voluntarily.

Nor was the respondent "summoned now" to the barracks, as the court stated. *Ibid.* He responded to a message left for him, and never pursued his request to schedule the meeting for the following day, a request that would not have been unreasonable under the circumstances.

taken out of context.[10] Some appear to be entirely irrelevant.[11] More important, many factors considered by the court involved incidents that occurred after the respondent was at the barracks for some time and did not directly bear upon the issue of the respondent's seizure. While events taking place after an initial encounter between the police and a suspect may shed light on the nature of the entire encounter, the state contends that the facts here do not justify that analysis. That is so because the record provides sufficient

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[10]The court included as one of the relevant factors in its decision the fact that Captain McDonnell informed the respondent that he was at the state police barracks and "not a hotel or anything like that." *See* App. E, *infra*, 20A-21A. The implicit suggestion of the court was that the captain was trying to inform the respondent that, unlike the situation in a hotel, where one can check in and out at will, he was in a state police barracks. The actual location of this statement in the transcript, coming as it does early in the interview and only a few lines before Captain McDonnell assured the respondent that he was not under arrest, *supra*, 9, appears clearly to indicate, however, that McDonnell's purpose was to insure that the tape recording that was being made disclosed that the respondent was fully aware of where he was and what he was doing.

[11]One factor identified by the court was that the officers asked the respondent whether he would consent to a search of his automobile. It is difficult to imagine how the officer's request made during the interview relates to the issue of seizure, as the court suggested. App. E, *infra*, 22A.

The court also stated that the officer's response to the respondent's request to see his wife was delayed, suggesting that the respondent had been temporarily deprived of an opportunity to speak privately with his wife. As the statement of the case *supra*, 8-9, demonstrates, however, the respondent's request was not motivated by a desire to confer with his wife privately, but by his expectation that his wife could provide McDonnell with additional facts relating to their out-of-state travel. The response was not delayed; the reason for the request was dissipated when McDonnell responded by saying that the details were not important. In fact, the respondent's later conversation with his wife was prompted by Sergeant Cudworth's suggestion and not a request by the respondent.

unambiguous detail concerning the initial encounter as to obviate the need for any retrospective reconstruction of the facts surrounding that encounter.

Instead, the question should properly be whether a lawful encounter was at some point transformed into an illegal seizure and, if so, when. *See United States v. Anderson*, 663 F.2d 934, 941 (9th Cir. 1981); *United States v. Richards*, 500 F.2d 1025, 1028 (9th Cir. 1974). The petitioner contends that if an informal seizure occurred at all in this case, it occurred at a point in time at which the police had probable cause to believe the respondent committed the killing. Assuming that the respondent made a clear request to leave the barracks when he said, "I'm pretty tired, you think I can go. . . ." (App. E, *infra*, 21A), it is evident that any constructive seizure at that point was supported by probable cause.[12]

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[12]Some of the more significant facts the police were then aware of were:

(1) the respondent had a serious and recent cut on his hand;

(2) the respondent had left the state hurriedly hours after the killing without making provision for the care of his dog or taking any clothes;

(3) the respondent mentioned the homicide and volunteered an explanation for the cuts on his hand to the officer who transported him to the barracks although no reason was even given for McDonnell's request to speak with the respondent and no one mentioned a homicide or the respondent's cuts;

(4) the respondent had AB type blood, the blood type found leading from the homicide scene to the adjacent parking lot, which was apparently then known to Captain McDonnell;

(5) the respondent had given inconsistent accounts of the times he went to Stanley's apartment, the events of his out-of-state travel during the week, and the events of the day of the killing; and

(6) the respondent finally admitted that it was possible that he was at the murder scene the night of the killing.

Certainly, these facts, taken together, are sufficient to warrant a prudent person, or one of reasonable caution, in believing in the circumstances shown, that the suspect probably committed the homicide. *See Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979).

In any event, even a cursory review of the facts of this case discloses that the state supreme court's decision is markedly at odds with this Court's pronouncements in the area of Fourth Amendment seizures. *See* Sup. Ct. R. 17.1(c) (1980). This case is hardly similar to *Dunaway*. If the decision of the Connecticut Supreme Court is allowed to stand, the administration of criminal justice in the state would unnecessarily be thwarted. Investigatory encounters between citizens or potential suspects and the police would be severely restricted in a manner unwarranted by the Fourth Amendment. The holding of the case would have a substantial effect upon the decisions of trial judges, prosecutors and police. And this would take place at a time when the governmental response to the growing incidence of crime must become more effective, within the confines of the law, and not less so. To permit this decision to stand would be to ignore a clear misapplication of the Fourth Amendment and to foster its perpetuation in other cases.

2. If the trial court erred in admitting the respondent's confession and certain physical evidence, then that error was clearly harmless beyond a reasonable doubt and the Connecticut Supreme Court's failure to so conclude effectively expanded the requirements of the federal constitution contrary to the decisions of this Court.

As the statement of the case discloses, *supra*, 12-13, the respondent elected to take the stand at trial. In the course of his testimony he ratified and amplified the confession that he gave to police five days after the killing and used the description of events surrounding the killing contained therein to advance his defense of absence of mental capacity. Although raised by the petitioner in his brief before the state supreme court, that court failed to address the claim that these facts rendered any error in the admission of the challenged evidence harmless beyond a reasonable doubt. App. F,

infra, 24A. Under the circumstances, the petitioner contends that the requirements of *Chapman* have been satisfied and that the state supreme court's failure to so conclude constituted an unwarranted expansion of federal constitutional rights.

In *Chapman v. California*, 386 U.S. 18, 23 (1967), this Court concluded that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." It went on to hold that, before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was "harmless beyond a reasonable doubt." *Id.*, 24. This holding was premised upon the conclusion that any harmless error rule that is applied to an error relating to a federal constitutional right is itself a federal question over which this Court has ultimate jurisdiction. *Id.*, 20-21.

It is, therefore, for this Court to decide under what circumstances a reviewing court may conclude that federal constitutional error was harmless. *See Fontane v. California*, 390 U.S. 593, 595-96 (1968). The petitioner contends that it is also for this Court to decide when a reviewing court must find federal constitutional error harmless. This is so because the ultimate authority for safeguarding federal constitutional rights resides with this Court. Lower courts of review ought not, by the application of self-devised harmless error rules, circumvent those rights. Nor ought lower courts of review enlarge the effect of a federal constitutional error beyond that warranted by the constitution itself. *See North Carolina v. Butler*, 441 U.S. 369, 376 (1979). As this Court said in *Butler, supra*, 376, "a state court can neither add to nor subtract from the mandates of the United States Constitution." This case, then, presents the reverse side of the question presented in *Chapman*, i.e., whether a lower court of review must, under certain circumstances, conclude that federal constitutional error was harmless beyond a reasonable doubt.

As applied to the facts of this case, the question is whether the federal constitution requires the reversal of a conviction and the suppression of the most probative evidence of guilt obtained through an alleged constitutional violation when the defendant at trial relies upon that very evidence in constructing his state of mind defense. Under the circumstances,[13] it is fair to say that the fact that the respondent caused the victim's death was not really at issue at trial. Instead, his state of mind at the time of the act was. Thus, under the typical formulation of the test for harmless constitutional error, the alleged error committed by the trial court in this case must be deemed to be harmless beyond a reasonable doubt. *See Brown v. United States*, 411 U.S. 223 (1973) (tainted evidence merely cumulative of other overwhelming and largely uncontroverted evidence properly before jury); *Schneble v. Florida*, 405 U.S. 427 (1972) (overwhelming independent evidence of guilt); *Harrington v. California*, 395 U.S. 250 (1969) (overwhelming evidence of guilt). The state supreme court's failure to so conclude constituted an unprecedented and unwarranted expansion of a federal constitutional right.

No interest sought to be protected by the Fourth Amendment would be advanced by finding harmful the erroneous admission of evidence that was proferred by the state and thereafter relied upon by the defendant. The state's interest in the fair and efficient administration of criminal justice, on the other hand, would be thwarted if a new trial is unnecessarily required in this case.[14] Moreover, the decisions of this

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[13]The respondent never indicated at trial that he was ratifying the confession only because his motion to suppress had been denied. Indeed, the defense strategy, of which the respondent gave notice prior to trial, was to admit the act but contest existence of the required state of mind.

[14]Even if a new trial were held in this case, there appears to be no reason why the respondent's in-court confession could not then be

Court indicating that the existence of federal constitutional error does not in itself mandate reversal of a criminal conviction would be seriously undermined.

3. This Court should adopt a good-faith exception to the exclusionary rule and apply it to this case.

As this Court has recognized, the exclusionary rule is not itself a requirement of the Constitution but rather a judicially devised remedy to deter future police misconduct.[15] *Stone v. Powell*, 428 U.S. 465, 482-86 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976). For that reason, this Court has not required the exclusion of illegally seized evidence where to do so would not effectuate the deterrent purpose of the rule. *See United States v. Paynor*, 447 U.S. 727 (1980) (illegal seizure of evidence from a third party not before the court); *United States v. Havens*, 446 U.S. 620 (1980) (evidence illegally seized admissible for impeachment); *United States v. Ceccolini*, 435 U.S. 268 (1978) (testimony of witness located as a result of illegal seizure); *United States v. Janis*, 428 U.S. 433 (1976) (evidence illegally seized in good faith admissible in taxpayer's civil suit); *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury witness could be required to answer questions based on evidence illegally seized); *see also Stone v. Powell, supra* (where state courts have provided an opportunity for full and fair litigation of a Fourth Amendment claim, federal habeas relief not

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used against him since any taint created by the allegedly illegal seizure on April 16, 1977, was surely dissipated by the time the respondent testified at trial with the advice of counsel some eighteen months later. *See Brown v. Illinois*, 422 U.S. 590, 603-604 (1975); *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

15 To the extent that the "imperative of judicial integrity" continues to provide any justification for the exclusionary rule; *see United States v. Peltier*, 442 U.S. 531, 536-38 (1975); *Stone v. Powell*, 428 U.S. 465, 485 (1976); it is apparent that that judicial interest is not offended where police act upon an albeit erroneous good-faith belief that their conduct is lawful. *Ibid.*, 485 n.23.

available on ground that illegally seized evidence was not suppressed at trial).

This Court's recognition of the inappropriateness of applying the exclusionary rule where to do so would not advance its purpose is the premise of the petitioner's argument in this case.[16] That is, the petitioner considers it entirely futile to speak of deterring police conduct by excluding evidence in a case in which the police acted with a reasonable, good-faith belief that their conduct was proper. If officers reasonably believe that they are acting within the requirements of the law, then there is nothing to deter, i.e., one cannot under those circumstances deter ignorance of the law on the part of the police, their belief being reasonable, or their intention to violate the law, there being none. *See Michigan v. Tucker,* 417 U.S. 433, 447 (1974); *see also Brown v. Illinois,* 422 U.S. 590, 612 (1975) (Powell, J., concurring).

On the other hand, to exclude evidence that is obtained under those circumstances exacts a tremendous price from the criminal justice system. *See Bivens v. Six Unknown Named Agents of Fed Bur. of Narc.,* 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). Public respect for the courts is not heightened when the public witnesses the courts turning their backs on evidence that may all but conclusively establish a defendant's guilt. Nor does the exclusion of evidence probative of guilt or innocence square with the avowed purpose of a criminal trial, the search for the truth. It is under most circumstances exceedingly difficult to reconstruct the facts surrounding the commission of a crime. It may be impossible to do so where evidence

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[16] Indeed, this Court went so far as to state in *United States v. Peltier,* 422 U.S. 531, 542 (1975): "[E]vidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

that is often most probative of guilt or innocence is deliberately excluded from the trial. And while those involved in the administration of criminal justice, no less than others, cherish the personal rights conferred by the United States Constitution, it has become increasingly difficult for them to attempt to justify the costly application of a remedy that remedies nothing at all.

The growing frustration with the senseless application of the exclusionary rule has prompted several courts to recognize exceptions to the rule's application similar to the one that the petitioner here proposes. *See United States v. Ajlouny*, 629 F.2d 830, 840-42 (2d Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981) (good-faith mistake of law); *United States v. Williams*, 662 F.2d 830, 846 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981) (good-faith mistake of law); *Nix v. State*, 621 P.2d 1347, 1349-50 (Alas. 1981) (consent to search; good-faith mistake of fact); *Richmond v. Commonwealth*, 29 Cr. L. Rptr. 2529 (Ky. Sept. 23, 1981) (mistake of law); *People v. Adams*, 53 N.Y.2d 1, 442 N.E.2d 537 (1981) (exigency; mistake of fact); *Commonwealth v. Bradshaw*, ___ Pa. Super. Ct. ___, 434 A.2d 181, 183 (1981) (good-faith but mistaken belief in informant's information); *see also Robberson Steel Co. v. Occupational Safety & Health Review Commission*, 645 F.2d 22 (10th Cir. 1980) (non-retroactive application of rule). In each of these cases, the courts wisely applied the principle that "[w]here the reason for the rule ceases, its application must cease also." *United States v. Williams, supra*, at 840; *see* Attorney General's Task Force on Violent Crime, 29 Cr. L. Rptr. 3131, 3134 (1981).

The exception proposed by the petitioner in this case is essentially that adopted by the Fifth Circuit in *Williams*. Thus, evidence obtained through illegal police conduct would not be excluded if the court concludes that the conduct in question "was taken in a reasonable, good-faith belief that it was proper." *Id.* at 847. The

reasonableness of any belief in the legality of the action taken is an essential component of the exception. Thus, no matter how sincerely held, any belief that the conduct taken was lawful that is not objectively reasonable, is of no consequence. Without such a provision, any exception to the exclusionary rule would encourage, if not reward, police ignorance of constitutional rights. *See Stone v. Powell*, 428 U.S. 465, 538 (1976) (White, J., dissenting).

If applied to the facts of this case, such a good-faith exception to the exclusionary rule would plainly be warranted.[17] The subjective good faith of the police in this case is apparent from the record. *See Brown v. Illinois*, 422 U.S. 590, 604 (1975). The fact that the police advised the respondent explicitly that he was not under arrest at the commencement of the interview at the barracks, the absence of any formal arrest or restraint, the care taken in advising the respondent of his *Miranda* rights, the attempt to secure an attorney for the respondent after he declined to obtain one, the suggestion at one point in the interview that the respondent confer with his wife and her presence while the respondent confessed, all attest to the fact that the police involved were not intent upon riding roughshod upon the respondent's constitutional rights. *See Dunaway v. New York*, 442 U.S. 200, 226 (1979) (Rehnquist, J., dissenting); *cf. Brown v. Illinois*, 442 U.S. 590, 605 (1975). With regard to the existence of a subjective good-faith belief that the respondent was not in custody at the time of the interview, the fact that

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[17] Although the argument that a good-faith exception to the exclusionary rule should be applied to this case was not made before the state supreme court, it is apparent that state courts may not authoritatively alter federal constitutional law as interpreted by this Court. To have urged the state supreme court to have done so in this case would have amounted to the proposition of a claim of law before a tribunal that is incompetent to rule definitively upon it. Moreover, to have raised this particular claim in the state court would not have facilitated this Court's consideration of it.

Captain McDonnell assured the respondent, who was feeling tired, that he should not worry about driving because "[w]e'll drive you where-ever [sic] you end up wanting to go," *supra*, 15, evidences the officers' subjective belief that the respondent was not in custody at the time and, therefore, that no violation of the law had occurred.

The objective reasonableness of their belief is equally apparent. As noted above, although their conduct preceded this Court's decision in *Dunaway v. New York*, 442 U.S. 200 (1979), the facts of this case are unlike those in *Dunaway*, which militated toward a finding of unlawful seizure. Not only did the police not formally arrest the respondent at the time he was escorted to the Litchfield barracks, they engaged in no conduct that had before then been defined as constituting constructive arrest or seizure. Finally, it is of more than passing significance that three judges of the state's superior court empaneled to try one of the most serious offenses under state law unanimously concluded, even after this Court's decision in *Dunaway*, that the respondent was not unlawfully seized prior to his formal arrest. A reasonably trained law enforcement officer ought not be expected to exceed the knowledge and training of three judges of the state's superior court.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Supreme Court of Connecticut or, in the alternative, vacate and reverse the judgment of that court.

Respectfully submitted.

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